



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 8**  
**999 18<sup>TH</sup> STREET - SUITE 300**  
**DENVER, CO 80202-2466**  
**Phone 800-227-8917**  
**<http://www.epa.gov/region08>**

**July 17, 2006**

CERTIFIED MAIL #7005 0390 0000 4845 4258  
RETURN RECEIPT REQUESTED

Ref: 8ENF-W

Fallon County Commissioners  
Donald Rieger, Chairman  
P.O. Box 846  
Baker, MT 59313-0846

Re: Findings of Violation and  
Administrative Order for Compliance  
Docket No. **CWA-08-2006-0032**

Dear Mr. Rieger:

Based on our review of all available information, the United States Environmental Protection Agency (EPA) has determined that Fallon County, a political subdivision of the State of Montana, is in violation of the Clean Water Act, as amended (CWA). The CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers prior to the discharge of pollutants (i.e., dredged or fill material) into waters of the United States. See, 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 33 CFR § 328.3.

Specifically, Fallon County has discharged dredged or fill material into waters of the United States without authorization under the CWA. These discharges of pollutants to Baker Lake, Upper Baker Lake, and their adjacent wetlands have occurred at property owned by Fallon County in section 13, Township 7 North, Range 59 East, Fallon County, Montana. Baker Lake, Upper Baker Lake, and their adjacent wetlands are part of a continuous tributary system that enters Sandstone Creek. Sandstone Creek enters O'Fallon Creek, which enters the Yellowstone River.

Enclosed is an EPA Region 8 administrative order which specifies the nature of the violations and describes actions necessary in order for Fallon County to achieve compliance with the CWA. EPA's authority for such action is provided under section 309(a)(3) of the CWA,



*Printed on Recycled Paper*

33 U.S.C. § 1319(a)(3). The order requires Fallon County to inform EPA in writing, within five days of receipt, of its intent to fully comply with the order.

The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that the issuance of this order does not preclude civil or criminal actions in the U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the order.

Please review the order carefully. If you have any questions, the most knowledgeable people on my staff are Wendy Silver, Enforcement Attorney, at 303-312-6637 and Monica Heimdal, Enforcement Officer, at 303-312-6359.

Sincerely,

**SIGNED**

Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice

Enclosure (Findings of Violation and Order for Compliance)

cc: Tina Artemis, EPA, Regional Hearing Clerk  
John L. Arrigo, Montana Department of Environmental Quality  
Albert R. Batterman, Fallon County Attorney  
David L. Lagrone, U.S. Army Corps of Engineers  
Allan Steinle, U.S. Army Corps of Engineers  
John Wardell, EPA, Montana Operations

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

<b>IN THE MATTER OF:</b>	)	<b>FINDINGS OF VIOLATION AND</b>
	)	<b>ADMINISTRATIVE ORDER FOR</b>
<b>Fallon County, a Political Subdivision of</b>	)	<b>COMPLIANCE</b>
<b>the State of Montana</b>	)	
<b>Baker, MT 59313</b>	)	<b>Docket No. CWA-08-2006-0032</b>
	)	
<b>Respondent.</b>	)	
_____	)	

**I. STATUTORY AUTHORITY**

This Findings of Violation and Administrative Order for Compliance (“Order”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by sections 308 and 309(a) of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1318 and 1319(a). This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

**II. FINDINGS OF VIOLATION**

1. Respondent Fallon County is a political subdivision of the State of Montana. Respondent’s primary offices are located at 10 West Fallon Avenue, Baker, Montana.

2. At all relevant times, Respondent owned, controlled, managed, and/or operated property that includes Baker Lake, Upper Baker Lake, and their adjacent wetlands located in section 13, Township 7 North, Range 59 East, Fallon County, Montana.
3. Baker Lake, Upper Baker Lake, and their adjacent wetlands are part of a continuous tributary system that enters Sandstone Creek. Sandstone Creek enters O'Fallon Creek, which enters the Yellowstone River. The Yellowstone River is, and was at all relevant times, a navigable, interstate water.
4. Beginning in or about January 2005, Respondent or persons acting on Respondent's behalf commenced construction work on Baker Lake. The work involved:
  - a. Excavation, including removal of emergent wetland vegetation extending an average of 30 feet into the lake, and/or fill of approximately 11,000 feet of lakeshore to a 3:1 slope. Excavated material was pushed with bulldozers and stockpiled below the ordinary high water mark ("OHWM") of Baker Lake; and
  - b. Placement of dredged or fill material below the OHWM in certain places where the shoreline slope exceeded 3:1. The dredged or fill material so placed averaged 5 feet in depth, extended over approximately 1330 feet of shoreline, and extended approximately 20 feet into the lake; and
  - c. Placement of dredged or fill material in the lake bed in front of a private residence. The dredged or fill material so placed covered an area approximately 400 feet by 40 feet; and
  - d. Placement of approximately 74,000 cubic yards of material removed from Baker Lake into a deposition area between Baker Lake and Upper Baker Lake partially comprised of wetlands. The exact amount of dredged or fill material in the wetlands is not known.

5. On February 15, 2005, a private citizen notified the U.S. Army Corps of Engineers (“Corps”) that wetlands around Baker Lake were being impacted by construction activities.
6. On February 16, 2005, the Corps met with three Fallon County Commissioners to discuss the work being performed at Baker Lake.
7. On February 17, 2005, the Corps issued a cease and desist order to the Fallon County Commissioners, notifying them that the work performed at Baker Lake was an apparent violation of the CWA and requiring them to cease any further unauthorized work. The Corps further requested that they provide detailed information regarding the work performed at Baker Lake.
8. On February 24, 2005, Respondent responded to the Corps’ cease and desist order and submitted information, a site map, and photographs pertaining to the work performed at Baker Lake.
9. On March 9, 2005, the Corps performed an inspection of Baker Lake and confirmed that Respondent had discharged or allowed the discharge of dredged and/or fill material in the areas of Baker Lake described in paragraph 4 of Section II of this Order.
10. On March 14, 2005, Respondent submitted an application to the Corps for a Section 404 permit for activities already completed at Baker Lake including cleaning (vegetation and silt removal) and sloping 2.3 miles of shoreline, at an average width of 60 feet; fill placement along a shoreline roadway; and fill placement along the north and northeast shore of the lake. The permit application also requested authorization to place 3500 - 6000 cubic yards of rip rap along 5240 feet of shoreline of Baker Lake and “a small section” of Upper Baker Lake.
11. On March 16, 2005, the Corps sent a letter to Respondent requesting additional information be submitted in order to process the permit application.

12. By letter dated April 14, 2005, Respondent provided some of the information requested in the Corps' March 16, 2005, letter and informed the Corps that the Respondent had installed a new boat ramp with rip rap protection, measuring 35 feet x 60 feet x 0.5 feet, in Baker Lake.
13. On September 20, 2005, the Corps documented evidence of recent and current construction activities that appeared to have resulted in new discharges of dredged or fill material to the shoreline and adjacent wetlands of Upper Baker Lake and Baker Lake.
14. The discharges described in paragraphs 4, 12, and 13 of Section II of this Order resulted in the elimination of more than 8.6 acres of wetlands and other waters of the United States. The wetlands and other waters provided various functions and values such as water quality improvement, including sediment filtration; aquatic, waterfowl, and songbird habitat; groundwater recharge; ecology education; recreation; and aesthetics.
15. The discharges described in paragraphs 4, 12, and 13 of Section II of this Order were performed using common earthmoving vehicles and equipment, which were operated by Respondent or by somebody on behalf of Respondent.
16. Respondent is a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
17. The discharged dredged and fill materials referenced in paragraphs 4, 12, and 13 of Section II of this Order are and were at all relevant times "dredged material" and "fill material" within the meaning of 33 C.F.R. § 323.2(c) and 33 C.F.R. § 323.2(e), respectively, and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
18. The vehicles and equipment described in paragraph 15 of Section II of this Order are and were at all relevant times each a "point source" within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).

19. Baker Lake, Upper Baker Lake, and their adjacent wetlands referenced in paragraphs 2 and 3 of Section II of this Order are and were at all relevant times “waters of the United States” within the meaning of 33 C.F.R. § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).
20. The placement of dredged and fill material into Baker Lake, Upper Baker Lake, and their adjacent wetlands constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).
21. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.
22. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.
23. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.
24. Respondent is not and never has been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraphs 4, 12, and 13 of Section II of this Order.
25. The activities conducted by Respondent and/or its agents as described in paragraphs 4, 12, and 13 of Section II of this Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondent into waters of the United States

without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

26. The removal of the dredged and fill material illegally discharged into waters of the United States at Respondent's property and restoration of the impacted shorelines of Baker Lake, Upper Baker Lake, and their adjacent wetlands to a condition that closely approximates their conditions and functions prior to the discharge of the dredged and fill material can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.
27. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). The removal and restoration described in paragraph 26 of Section II of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondent's unauthorized activities.
28. This Order was issued after consultation and coordination with the Corps' Omaha District.

### **III. ORDER**

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED:



1. Respondent shall immediately terminate all unauthorized discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.
2. Within five (5) calendar days of receipt of this Order, Respondent shall inform EPA in writing of Respondent's intent to fully comply with the Order. EPA requests that Respondent meet with EPA within fourteen (14) calendar days of issuance of this Order if there are concerns or questions about the requirements of the Order. The scheduling of such a meeting shall not alter Respondent's responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondent by EPA.
3. Upon EPA approval of the restoration plan required by paragraph 6 of Section III of this Order, Respondent shall remove all dredged and fill materials that were discharged as a result of the violations identified in this Order and restore the impacted shorelines of Baker Lake, Upper Baker Lake, their adjacent wetlands, and any other impacted areas to their pre-impact condition and grade, unless otherwise approved by EPA in the restoration plan.
4. All dredged and fill material removal and restoration activities shall be conducted in accordance with an EPA-approved restoration plan prepared by a consultant experienced in wetland restoration. The consultant also shall directly supervise all work performed pursuant to the EPA-approved restoration plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.

5. All dredged and fill material removal and restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in wetland restoration. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
6. Within sixty (60) calendar days of receipt of this Order, Respondent shall submit to EPA for review and comment a restoration plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for removing the discharged dredged and fill material from Baker Lake, Upper Baker Lake, their adjacent wetlands, and any other impacted areas and restoring all impacted areas to their pre-impact condition and grade.
7. The restoration plan shall be prepared in accordance with "U.S. Environmental Protection Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans," attached hereto as Exhibit A. In addition, the restoration plan shall include:
  - a. A complete assessment of the impacts to Baker Lake, Upper Baker Lake, and their adjacent wetlands due to the Respondent's discharges of dredged and fill material;
  - b. A detailed work plan and schedule for all of the work to be accomplished, as specified in the restoration plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than sixty (60) days after EPA approves the restoration plan;
  - c. Locations of the existing natural features and man-made improvements, including all surface disturbance, fills, channel excavations, road crossings, culverts, structures, and any other work, including a corresponding map of these locations;

- d. Grading, planting, and monitoring plans, measurable criteria for success of restoration, and provisions for proper disposal of any excess soils or other materials generated during removal and restoration;
  - e. Detailed professional drawings of all of the work to be accomplished, as specified in the restoration plan, including plan and profile drawings with control elevations; and
  - f. A description of all costs necessary to complete the work to be accomplished by the restoration plan, including the costs of consultations, permits, monitoring, and construction.
8. EPA will review the restoration plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the restoration plan, Respondent shall, within fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.
9. Upon receiving EPA's written approval of the restoration plan, Respondent shall obtain all necessary permits to implement the EPA-approved plan and then commence all restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondent shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.
10. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondent shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA. If required, Respondent

shall obtain such permit(s) and provide a copy to EPA pursuant to paragraph 9 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers  
10 West 15th Street, Suite 2200  
Helena, MT 59626  
Telephone: 406-441-1375  
Facsimile: 406-441-1380

11. Respondent shall submit two (2) copies of the restoration plan, all notifications, and related correspondence to:

Monica Heimdal, 8ENF-W  
U.S. Environmental Protection Agency, Region 8  
999 18th Street, Suite 300  
Denver, CO 80202-2466  
Telephone: 303-312-6359  
Facsimile: 303-312-6409

A copy of the restoration plan, all notifications, and related correspondence also shall be provided to:

Wendy Silver, 8ENF-L  
U.S. Environmental Protection Agency, Region 8  
999 18th Street, Suite 300  
Denver, CO 80202-2466  
Telephone: 303-312-6637  
Facsimile: 303-312-6953

A copy of the restoration plan also shall be provided to the Corps at the address noted in paragraph 10 of Section III of this Order.

12. In addition to the notification requirement set forth in paragraph 11 of Section III of this Order, after issuance of any Corps authorization for restoration work, Respondent shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

13. Any deliverables, plans, reports, specifications, schedules, and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.

14. Respondent shall allow, or use its best efforts to allow, access by any authorized representatives of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, the Montana Department of Environmental Quality, and Montana Fish, Wildlife and Parks, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Order;
- b. To inspect and monitor compliance with this Order; and
- c. To verify and evaluate data and other information submitted to EPA.

This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

15. Respondent's obligations under this Order are joint and several. This Order shall be effective upon receipt by Respondent.

16. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$27,500 per day for each violation which occurred on or before March 15, 2004, and \$32,500 per day for each violation thereafter, of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a), including this Order. Additionally, section

309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.

17. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondent of its obligation to comply with any applicable Federal, state, or local law or regulation. Failure by Respondent to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject Respondent to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 14<sup>TH</sup> day of July, 2006.

**SIGNED**

\_\_\_\_\_  
Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice

## **Exhibit A**

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE  
CONTACT THE REGIONAL HEARING CLERK'S OFFICE.**

**THIS DOCUMENT WAS FILED IN THE REGIONAL HEARING CLERK'S OFFICE  
ON JULY 17, 2006.**